

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

JAMASA Z. DERRING,

Defendant-Appellant,

SUPREME COURT NO. 120696
COURT OF APPEALS NO. 224937
LOWER COURT NO. 99-01125-FC

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SUPPLEMENTAL BRIEF

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STATEMENT OF FACTS

Plaintiff-Appellee will identify irrelevant facts for this brief in the body of its argument.

ARGUMENT

ISSUE I

WERE THE OUT OF COURT STATEMENTS ADMITTED AT TRIAL HEARSAY UNDER MRE 801(c)?

It has been the position of the Plaintiff-Appellee, that the statements of the deceased Dustin Sherrell, relayed through the testimony of four witnesses were hearsay, but admissible under the catch all hearsay rule, MRE 804(b)6.

The trial court essentially agreed with the position of the Plaintiff-Appellee, and in the course of two written orders made a ruling based upon specific factual findings regarding the various statements and the individual witnesses utilized at trial. One order was issued in a related prosecution but was stipulated by the parties to relate to the case at issue in this appeal. (Motion Transcript, September 13, 1999 - pages 5 - 7) It was argued by Plaintiff-Appellee at that hearing that the statements at issue in the case at bar, had an additional criteria for admission, that is a motive for shooting the three victims. (Motion Transcript, September 13, 1999, pages 7 - 8)

Given this agreement by the parties at the pre-trial motion hearings, it is also helpful to make this Court aware of the opinion and order of the trial court filed in the related case, as well as the opinion in the order attached to Appellant's Application for Leave. Both of these orders were attached to the Plaintiff-Appellee's brief in the Court of Appeals, and are attached to this supplemental brief for the convenience of this Court.

With the consideration of the orders, the position of the Plaintiff-Appellee is that the trial court made a careful and considered decision regarding the use of these statements under MRE 804(b)6, and fulfilled the requirements of that rule to make this evidence admissible for purposes of the catch all hearsay rule.

This decision to admit evidence is reviewed for an abuse of discretion. People v. Starr, 457 Mich 490 (1998). With the decision regarding admission, since it involves a question of law under a rule of evidence, being reviewed de novo. People v. Lukity, 460 Mich 484 (1999).

In reviewing the December 12, 2003, order of this Court, it has occurred to Plaintiff-Appellee that in regard to the instant case, since the out of court statements were admitted for proof of the

Defendant-Appellants motive in the killings of the three young victims, this use of the statements could arguably be for the purposes of either showing the state of mind of the Defendant-Appellant, or the state of mind of the victim, declarant Dustin Sherrell.

The state of mind of the Defendant-Appellant is at issue in a murder prosecution, and is long standing in the law of Michigan. People v. Scott, 6 Mich 287 (1859). The out of court statements of Dustin Sherrell, if known to the Defendant-Appellant, would give an obvious reason to eliminate the declarant, and the other two friends, who also may have some knowledge of the statements, or simply may have been in the wrong place at the wrong time.

The issue of deciding if the state of mind of the criminal actor and/or the victim has been examined by this Court in People v. Fisher, 449 Mich 441 (1985). The Court began the analysis by succinctly stating the problem:

We agree with the conclusion reached by the trial court. It is well accepted that evidence that demonstrates an individual's state of mind will not be precluded by the hearsay rule. Several legal scholars have commented on the nonhearsay use of such evidence:

Wherever an utterance is offered [into] evidence [for] the *state* of mind which ensued in *another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned. [6 Wigmore, Evidence (Chadbourn rev), § 1789, p 314. Emphasis added.]

Likewise, in 4 Weinstein, Evidence, ¶ 801(c)[01], pp 801-94 to 801-96:

An utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The policies underlying the hearsay rule do not apply because the utterance is not being offered to prove the truth or falsity of the matter asserted.

499 Mich at 499& 450

In Fisher, this Court went on however to appear to hold that the admission of the statements at issue were an exception to the hearsay rule, specifically MRE 803(3), a declaration of an existing mental state. Therefore, although it would seem likely that motive for the Defendant-Appellant is not strictly speaking hearsay, this Court's use of a hearsay exception, in Fisher, makes it wise for the

Plaintiff-Appellee to identify a correct and applicable hearsay exception, in this case the catch-all hearsay provision found at MRE 804(b)(6).

It continues to be the position of Plaintiff-Appellee that this statement can be interpreted to be hearsay and was properly admitted under the exception to the hearsay rule MRE 804(b)(6). This is what the Court of Appeals ruled. This position is supported by this Court's recent decision in the related catch-all hearsay case, of People v. Katt, 468 Mich 272 (2003), where the almost identical catch-all hearsay exception under MRE 803(24) was examined. The only difference between that catch-all provision and the one at issue in this case is the availability of the declarant.

A related decision was also published and cited by the Court of Appeals in its decision under, People v. Lee, 243 Mich App 163; 622 NW 2nd 71 (2000), again using an analysis similar to the trial courts analysis.

The Plaintiff-Appellee asks this Court to simply affirm this conviction by declining to review this case on the merits, since the Court of Appeals correctly decided the issues under analysis much like, if not identical, to that later used by this court in its Katt decision.

ISSUE II

IF THE STATEMENTS USED AT TRIAL WERE HEARSAY, WERE THEY ALSO USED FOR A NON HEARSAY PURPOSE?

In the instant case it is clear that the out of court statements of Dustin Sherrell, did establish a motive for the murder of three young people.

If these statements are not hearsay, the admissibility under this purpose would be governed by MRE 401 and MRE 403.

These two rules are basis for defining relevant evidence. Here the claims of Dustin Sherrell that the Defendant-Appellant shot and killed a person, would naturally cause some effort to refute or prevent these type of statements from being aired. This was done by killing the declarant and the other two decedents.

This motive explains why the Defendant-Appellant would kill three of his friends in order to conceal his previous involvement in the killing of a fourth, apparently unrelated individual. This relevancy was supported by developing testimony that the Defendant-Appellant used in this killing,

a gun that was linked to the disposal of his dog and also the initial homicide that supplied the motive for this later multiple killing at issue in the instant case. The use or access to a murder weapon has been deemed to be a reason to reveal evidence of other crimes in Michigan case law; People v. Hall, 433 Mich 573 (1989); People v. Billington, 116 Mich App 220 (1982).

The related evidence rule of MRE 403 requires the exclusion of relevant evidence, if its probative value is substantially outweighed by the danger of unfair prejudice to the Defendant-Appellant. In the instant case, the hearsay statements are essentially the sole method of proving this motive. These statements establish that Dustin Sherrell was talking to various persons about the involvement of the Defendant-Appellant in the earlier murder. Although this earlier murder has some danger of prejudice to the Defendant-Appellant, it is the preeminent fact in explaining why he would be motivated to dispose of the victims in this case, three persons that were often considered to be his friends. This use of the evidence seems consistent with previous rulings of this Court, in People v. McKinney, 410 Mich 413 (1981) and in People v. Hampton, 407 Mich 354 (1979).

ISSUE III

IF THE STATEMENTS OFFERED BOTH AS HEARSAY AND A NON HEARSAY PURPOSE, WHAT WOULD BE THE TEST FOR DETERMINING ADMISSIBILITY ?

Since the admission of this evidence is subject to a balancing test and subject to the issue of relevancy, the standard of review would be for abuse of discretion. People v. Starr, supra and People v. Lukity, supra.

The admission of this evidence as either hearsay or non-hearsay proof of motive, would be governed by the same abuse of discretion standard noted in Issue I.

The admission of this evidence is subject to the balancing test of MRE 403, but this is also essentially the requirement requiring reliability for the hearsay exception under MRE 804(b)(6).

This Court has recently held that admission of evidence under MRE 403 is by an abuse of discretion standard. Waknin v. Chamberlain, 467 Mich 329 (2002). Holding that prejudice must substantially outweigh the probative value of the evidence.

In the instant case, it is very probative and corroborated by the use of the same gun in these murders, the previous murder, and the prior incident where Defendant-Appellant used the same gun

to dispose of a sick dog. It was also established this gun was owned and used by the Defendant-Appellant. Trial Transcript Vol. II, p. 164-168; Trial Transcript Vol, II p. 81-84; Trial Transcript Vol. III, p. 220-233.

It is the position of the Plaintiff-Appellee that the evidence was appropriately admitted at trial and this Court should affirm by declining further review of this case.

Dated: January 7, 2004

Respectfully submitted,

FREDERICK ANDERSON
PROSECUTING ATTORNEY

By:

A handwritten signature in dark ink, appearing to read "D. E. Ketchum", written over a horizontal line.

Douglas E. Ketchum,
Assistant Prosecuting Attorney

DEK/jms

STATE OF MICHIGAN

IN THE 48TH CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

THE PEOPLE OF THE STATE OF MICHIGAN,

VS.

File: 99-11247-FC
OPINION OF THE COURT

JAMASA Z. DERRING,

Defendant

The prosecutor has asked this Court to allow certain hearsay statements into testimony under MRE 804(6). This catch-all provision of Rule 804 required the declarant thereof to be unavailable and that the statement fit into no other exception to the hearsay rule. The statements proposed by the prosecutor were made by either Dustin Sherrell or Jon Edwards to four different individuals. Both declarants are unavailable having died as a result of gunshot wounds allegedly inflicted by the Defendant Derring. This assertion of the prosecutor being strongly supported by circumstantial evidence, the motive for which shooting would appear to be to silence the decedents to stop them talking to authorities with reference to the Flores killing.

Without detailed analysis the statement offered would not fit under any other exception to the hearsay rules.

804(6) keys on trustworthiness of the statement if the other requirements of 804(6) are met.

A: Statement is offered as proof of a material fact.

All four statements relocated the central issue of this case, i.e. who shot and killed Flores.

B: The statement is more probative of the fact for which its offend than anything else available to the prosecutor.

Direct testimony exists which puts the Defendant and Dustin Sherrell near the intersection of the roads 109 and 60 at or about the time of the shooting of Flores. Defendant made statements to others able to testify concerning the incident and that he was involved in the same. Physical evidence of the guns, ballistics and ownership is quite strong tying the defendant to the same. What appears to be missing however is any testimony from the only eye witness who saw the shooting. The witness Martha Cruz

Torres while in the car saw nothing only heard a shot. Statements made by the only eye witness if probative, are the most probative evidence if the issues here even in light of strong circumstantial evidence.

C: General purpose of rules and the interest of justice will be served.

The search for truth and solutions for serious crime infers fair use of such evidence if trustworthy.

Are the Statements Trustworthy?

Witness George Segelstrom testified that for a year or so prior to Dustin Sherrell's death he was as close friend of the entire family. He stated that on a date shortly after Flores' death that he was taking Jon Edwards (deceased) and Dustin Sherrell from their residence to 109th Street to be picked up by friends to go to Holland, Michigan. While waiting on the side of 109th for pickup, Dustin and Jon were talking in the back seat of his Mercury Sable car and he overheard discussions between the two as to the shooting of Flores. The statement by Dustin that he would shoot the entire Sherrell family if anyone told, to quote Dustin stated, "I can't believe he shot him."

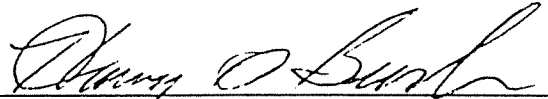
Nacole Lawrence, cousin of Dustin, close to Dustin who sometime after the shooting was discussing the defendants dating relationship with Darla, his sister. The reason he gave was the Defendant shooting of Flores. He, Dustin, indicated the motive for the shooting was robbery. Dustin described the subsequent car wreck. In her opinion Dustin was nervous when he talked to her and specifically stated to her Jamasa shot Flores.

Jessica Jones was, for a period of months, the girlfriend of Dustin Sherrell and was still a friend even after they stopped dating. She had observed the behavior of Defendant and Dustin the night Flores was shot. Later in his room on subsequent date she inquired as to the cause of his paranoid behavior, to which he responded that Jamasa had shot somebody. He basically told her stories which coincided with those he told the night of the shooting and the statements concerning Jamasa just seemed to slip out.

Joe Green, a cousin of Dustins, was present in Dustin's room with Joe Chastain and Defendant about 2 days after Flores was shot. Dustin told him in the presence of others he shot Flores. Later, while walking with Defendant and others to Uncle Mike's house, Dustin denied his early statement.

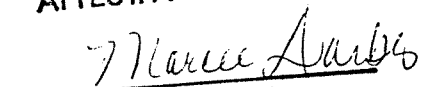
Taken as a whole, were these statements by Dustin Sherrell trustworthy? With the exception of Jessica Jones, all appear to have been spontaneously made without being prompted by anyone or thing. With the exception of Green's statement, they were consistent repetitions. Motive to fabricate seem to be lacking in that at no time does Dustin Sherrell deny his involvement, or attempt to shift blame for his part therein. Rather, all witnesses described him as being upset, afraid, incredulous that Defendant shot Flores. The statements were all made privately to his friends who in the ordinary course if he needed to talk about the incident were those to whom he might speak, his age 16 years makes the impact of the event more likely disturbing to him and would probably find him with less tools to deal with it alone. The witnesses characterize Dustin as having somewhat in shock at events and position he found himself in.

Taken together, they are consistent with a youngster disturbed who needed to deal with his emotions, consistent in content, and having a ring of trustworthiness which come from emotions such as fear, inability to rationalize, accept and as such in this Court's opinion, considering People v Welch 226 Mich App 461, 1997, to be admissible under 804(6).



HARRY A. BEACH
Circuit Court Judge

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DEPUTY CLERK

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RE: PEOPLE OF THE STATE OF MICHIGAN
v. JAMASA Z. DEERING

SUPREME COURT FILE NO. 120696
COURT OF APPEALS FILE NO. 224937
TRIAL COURT FILE NO. 99-01128-FC

Dear Clerk:

Enclosed please find the original Plaintiff-Appellee's Supplemental Brief together with a proof of service for same to Defendant-Appellant counsel.

If you have any questions, please feel free to contact this office.

Sincerely,


Douglas E. Ketchum
Assistant Prosecuting

/jms
Enclosure

cc: Elliot D. Margolis, Esq., Attorney for Defendant-Appellant
Allegan County Circuit Court

